

STATE OF MICHIGAN  
IN THE SUPREME COURT

TEDDY 23, LLC, a Michigan limited  
liability company, and MICHIGAN TAX  
CREDIT FINANCE, LLC, a Michigan  
limited liability company d/b/a MICHIGAN  
PRODUCTION CAPITAL,

Docket No. 153420

Plaintiffs/Appellants,

v

Court of Appeals Nos. 323299,  
323424

MICHIGAN FILM OFFICE and MICHIGAN  
DEPARTMENT OF TREASURY,

Ingham Circuit Court  
No. 14-702-AA

Defendants/Appellees.

Court of Claims  
No. 14-39-MT

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**MICHIGAN FILM OFFICE'S BRIEF IN OPPOSITION TO  
TEDDY 23 AND MICHIGAN PRODUCTION CAPITAL'S  
APPLICATION FOR LEAVE TO APPEAL**

Bill Schuette  
Attorney General

Aaron D. Lindstrom (P72916)  
Solicitor General  
Counsel of Record

Matthew Schneider (P62190)  
Chief Legal Counsel

Christina M. Grossi (P67482)  
Joshua O. Booth (P53847)  
Assistant Attorneys General  
Attorneys for Michigan Film Office  
Defendant–Appellee

Dated: April 21, 2016

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**COUNTER-STATEMENT OF QUESTIONS PRESENTED**

1. The Court of Claims Act specifically excludes an appeal of the decision of an administrative agency from the jurisdiction of the Court of Claims. Here, the Appellant Film Companies filed an appeal of a decision of the Michigan Film Office in the Court of Claims. Did the Court of Claims err in dismissing their appeal based on lack of subject matter jurisdiction?

Appellants' answer: Yes.

Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

2. A circuit court only has jurisdiction to grant leave over an untimely appeal of an administrative decision when authorized by statute, and, may still consider the length of and reasons for delay in determining whether to grant leave. Appellant Film Companies did not cite a statute authorizing their late filing or provide a reasonable explanation for the delay. Did the Circuit Court abuse its discretion by denying leave to appeal?

Appellants' answer: Yes.

Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

## STATUTES INVOLVED

### MCL 600.6419

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than \$1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:

- (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.
- (b) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ that may be pleaded by way of counterclaim on the part of the state or any of its departments or officers against any claimant who may bring an action in the court of claims. Any claim of the state or any of its departments or officers may be pleaded by way of counterclaim in any action brought against the state or any of its departments or officers.
- (c) To appoint and utilize a special master as the court considers necessary.
- (d) To hear and determine any action challenging the validity of a notice of transfer described in section 6404(2) or (3).

....

- (5) This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.

**COUNTER-STATEMENT OF ORDER  
APPEALED FROM AND RELIEF SOUGHT**

Appellants Teddy 23, LLC and Michigan Tax Credit Finance, LLC, doing business as Michigan Production Capital (referred to collectively as “Film Companies”) seek leave to appeal the published opinion of the Court of Appeals dated December 15, 2015, affirming the decisions of the trial courts in this matter and the Court of Appeals’ order dated February 12, 2016, denying their motion for reconsideration of that decision. The Film Companies’ application for leave to appeal should be denied.

## REASONS FOR DENYING THE APPLICATION

Everything that you know of procedure you must carry into every substantive course. You must read each substantive course, so to speak, through the spectacles of the procedure. For what substantive law says should be means nothing except in terms of what procedure says that you can make real.<sup>1</sup>

Civil Procedure. It's a mandatory part of the curriculum at every law school in the country for good reason. Because like the tree that falls in a forest with no one around to hear, does the well-penned brief make a sound if it's not been properly filed? That's the heart of the dispute between these parties and one that the Film Companies believe is of such public import that the highest court in this State should give answer. Put plainly, should civil procedure—including rules about jurisdiction, which controls the authority of courts to hear cases in the first place—stand mute when equity comes to call?

The Court of Claims Act expressly excludes from the jurisdiction of that court appeals taken from administrative decisions. Those appeals fall under the exclusive jurisdiction of the circuit court. Ignoring this clear statutory law, these Film Companies filed an appeal of a decision of the Michigan Film Office in the court of claims. While the court of claims was considering a motion to dismiss the appeal based on lack of subject matter jurisdiction, these Film Companies filed a delayed application for leave to appeal in the circuit court just one day before the six-month

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<sup>1</sup> *The Bramble Bush: On Our Law and Its Study*, by Karl N. Llewellyn (original work published in 1930 by author; in 2012 by Quid Pro Books). *Google Book Search*. Web. 20 April 2016.

bar. They gave no persuasive reason for the delay; instead, they boldly reiterated to the circuit court that the appeal belonged in the court of claims.

And, when both courts properly dismissed the appeals, one based on statute and the other based on court rule, the Film Companies cried foul and now conjure grand notions of constitutional questions and matters of jurisprudential significance. But this case is what it always has been – an elementary lesson of civil procedure: a court may only hear that which it has subject-matter jurisdiction to consider. Or, as Professor Llewellyn recounted to his law students more than 80 years ago, that substantive law means nothing except that which civil procedure says can be made real. These Film Companies’ application requesting that this Court now take-up such an elementary proposition should be denied.

## **COUNTER-STATEMENT OF FACTS**

### **Meet the Michigan Film Office.**

The Michigan Film Office (now called the Michigan Film & Digital Media Office) was created to attract and assist the film industry in Michigan. The Film Office is part of the Michigan Strategic Fund (MSF). MCL 125.2029a(1). The MSF, in turn, is a public body corporate and politic. MCL 125.2005(1). While the MSF was located within the Department of Treasury at the time of this dispute, it was an autonomous entity as a matter of law<sup>2</sup> and was to exercise its “powers, duties and functions independently” from the Department of Treasury. *Id.* In 2014, MSF (and

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<sup>2</sup> See MCL 125.2005(1) stating, in relevant part, “and the fund shall be an autonomous entity within the department of treasury . . . .”

thus the Film Office) was re-located to the Department of Talent and Economic Development by executive order of the Governor.<sup>3</sup> See Executive Order No. 2014-12. It remains there to this day.

### **What's this case about?**

The Film Companies allege that this case is about the denial of a tax credit. It is not. This appeal involves the denial of a request for a postproduction certificate of completion under Section 455 of the Michigan Business Tax Act (MBT). A tax credit and a post-production certificate of completion are different things under the MBT. Most important in that regard, the Film Office approves or denies an application for a postproduction certificate of completion, whereas the Department of Treasury processes tax credits after a postproduction certificate of completion has been issued and filed with a tax return.

Here's how it works.<sup>4</sup> The MBT allows the Film Office, with the concurrence of the State Treasurer, to enter into an agreement with an eligible production company to provide the company with a credit against the tax imposed under the

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<sup>3</sup> Article V, section 2 of Michigan's 1963 Constitution provides the Governor with authority to make changes to the organization of the Executive Branch or in the assignment of functions among its units for purposes of efficient administration.

<sup>4</sup> The Legislature recently enacted 2015 PA 117, which prohibits the Film Office from providing new funding, or increasing funding through amendment to an existing agreement, for direct production expenditures, Michigan personnel expenditures, crew personnel expenditures, or qualified personnel expenditures under MCL 125.2029h(1). This is notable here only because the statutory amendment prevents cases similar to this from occurring in the future—which is another reason why this case lacks jurisprudential significance worthy of this Court's review.

Act. MCL 208.1455(1). To qualify for the tax credit, a company must meet all statutory requirements including, but not limited to, entering into an agreement with the Film Office and receiving a postproduction certificate of completion from the Film Office. MCL 208.1455(1)(b),(c).

To receive the postproduction certificate of completion, a company submits a request to the Film Office along with any information or independent certification the Film Office or Department of Treasury deems necessary. MCL 208.1455(5). The Film Office processes these requests within 60 days unless it requires additional information. *Id.* The Film Office “need not issue the postproduction certificate of completion until satisfied that direct production expenditures, qualified personnel expenditures, and eligibility are adequately established.” *Id.* If a certificate is issued by the Film Office and then submitted to the Department of Treasury, the Department of Treasury is required to refund the amount that exceeds the production company’s MBT liability. MCL 208.1455(8).

### **Teddy 23’s pursuit of a postproduction certificate of completion.**

The basic factual background of this case was accurately summarized by Judge Talbot in his Court of Claims opinion:

In this case, on July 19, 2010, Teddy 23 entered into an agreement with the Film Office in connection with a film entitled “Scar 23.” The anticipated tax credit under the agreement was \$4,285,286. After production began and the scope of the project increased, an amended agreement with the Film Office was entered into with proposed tax credit of \$6,349,529. The film was financed by Michigan Tax Credit Finance which used the estimated film credit as security for a loan.

In April 2011, Teddy 23 ceased production of the film which was never completed. In preparation of submitting a request for a certificate of

completion needed to claim the tax credit, and pursuant to the procedures set forth in MCL 208.1455(5), Teddy 23 hired an independent auditor who concluded that \$10,737,904 of qualified expenditures had been made in Michigan. In May 2011, Teddy 23 submitted its auditor's report along with a request for a postproduction completion certificate to the Film Office. On June 20, 2013, following a 2-year review by both the Film Office and the Department [of Treasury], the Film Office issued a letter denying the postproduction certificate because it concluded that (1) Teddy 23 had insufficient capital available to pay for all of the reported expenditures; and (2) a significant portion of the expenditures were based on services that were never performed. On August 16, 2013, the Film Office rescinded its June 20, 2013 denial, and issued a new letter alleging fraud, applying a 100% fraud penalty, and again denying the postproduction certificate. Teddy 23 and Michigan Tax Credit Finance subsequently hired a certified fraud examiner who determined that no evidence of fraud existed. After issuing and rescinding two more denial letters, on December 13, 2013 [sic<sup>5</sup>], the Film Office issued its last denial:

[Y]our request for approval of your Post Production Certificate for the project Scar 23 for Teddy 23, LLC is denied.

After reviewing a report of expenditures submitted based from the audit report, it was determined that a significant amount of expenditures did not qualify as qualified expenditures, requiring a reduction in the credit available.

Additionally, in review of the expenditures submitted, there is evidence that there was intentional submission of information that appears to be false and fraudulent with a fact pattern that would lead us to believe that the information was known to be false and fraudulent. The result of this is the basis of the full denial of the certificate application. [8/8/14 Opinion and Order, p 3-4; see Appellants' COA Exhibit 1.]

The December 11, 2013 denial was grounded in reasons set forth in a June 10, 2013, 13-page memorandum drafted by the Department of Treasury, when

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<sup>5</sup> The letter was dated December 11, 2013 (Appellants' COA Exhibit 17).

Treasury performed an audit on behalf of the Film Office. That memorandum detailed an extensive “cash loop,” summarized as follows:

The production company [Teddy 23, LLC] never got most of the funding from the European company, Perpetual Motion. Between a few private investors, a small initial payment from Perpetual Motion and the loan from Michigan Film Finance, LLC, the production company was lent only \$6.4 million. Although the expected loan from Perpetual Motion never fully materialized, the production company submitted a Post Production Certificate Request claiming expenditures of \$10,753,554. Treasury attempted to find the source of the money that would have closed the \$4.3 million funding gap. The sources of the gap funding of \$4.3 million are the related parties who were also vendors for the project.

The problem with the gap funding by related parties is that it appears to be nothing more than the same few hundred thousand dollars recycled through a series of related companies. While there is nothing wrong with paying a related company for services and then having that company plow its profits back into the production, the recycling in the instant case went well beyond simply reinvestment of profits. The recycling of the cash increased the production company’s expenditures with every journey through the cash loop. [Appellants’ COA Exhibit 18, p 1-2.]

Essentially, “the production company claimed \$10,753,554 in expenditures when it had capital to cover about half the amount claimed as expenditures. The only way to close that financing gap was to recycle the same cash repeatedly to the principals and their related companies and send the cash back for another round” (Appellants’ COA Exhibit 18, p 12). According to the memorandum, the misstatements regarding the expenditures “were on a scale that was so large and pervasive” that the only reasonable conclusion was that they must have been intentional (Appellants’ COA Exhibit 18, p 1). Consequently, in a December 11, 2013 letter, the Film Office denied the postproduction certificate of completion on the basis of fraud (Appellants’ COA Exhibit 17).

## PROCEEDINGS BELOW

### **Court of Claims proceedings**

On February 10, 2014, the Film Companies filed an appeal in the Court of Claims naming the Film Office and the Department of Treasury as defendants and challenging the Film Office's denial of the postproduction certificate of completion. The state agencies, in separate motions, sought summary disposition on jurisdictional grounds. On August 8, 2014, the Court of Claims granted those motions and dismissed the case for lack of jurisdiction (see Appellants' COA Exhibit 1, p 11-12).

### **Circuit Court proceedings**

On June 10, 2014, purportedly in response to the state agencies' motions for summary disposition in the Court of Claims, and while those motions were pending, the Film Companies filed a delayed application for leave to appeal in the circuit court. (Delayed Application for Leave to Appeal, p 6). On June 17, 2014, before the Film Office or Department of Treasury answered the delayed application for leave to appeal, the circuit court denied leave, and on July 29, 2014, the Film Companies' motion for reconsideration of that decision was denied (see Appellants' COA Exhibit 2).

### **Court of Appeals proceedings**

The Film Companies filed claims of appeal from the circuit court's order <sup>6</sup>and the Court of Claims' order<sup>7</sup>. Those appeals were consolidated, and on December 15, 2015, in a unanimous and published opinion, the Court of Appeals affirmed the decisions of both courts. (See Appellants' Appendix 1, COA Opinion).

First, as to the Court of Claims, the Court of Appeals held that the Film Companies' argument that the Revenue Act provided that court with jurisdiction to hear their appeal was premised on a misunderstanding of the relationship between the Film Office and the Department of Treasury. *Id.* at pg 4-5. The Court of Appeals recognized that the Film Office and the Department of Treasury were separate entities with distinct responsibilities when it came to film tax credits. *Id.* Because the Film Office made the decision to deny the Film Companies' request for a postproduction certificate of completion, the Revenue Act, which vests the Court of Claims with jurisdiction over decisions of the Department of Treasury, was inapposite. *Id.* Instead, the Court of Claims Act controlled jurisdiction. *Id.* at 5-6. Applying that Act, the Court of Appeals held that dismissal was proper because the Act expressly states that it "does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law." *Id.* at 5 (quoting MCL 500.6419(5)). Thus, the Court of Claims

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<sup>6</sup>Court of Appeals docket number 323424.

lacked subject matter jurisdiction over the Film Companies' appeal and properly dismissed it.

As to the circuit court, the Court of Appeals found that the court's failure to provide a specific analysis as to why the delayed application for leave to appeal was denied was not an abuse of discretion,<sup>8</sup> particularly in light of the fact that the circuit court ruled on the Film Companies' motion to reconsider that decision. *Id.* at 6. Further, the Court of Appeals found unpersuasive the Film Companies' various arguments that they were somehow induced by the State (either by the *Taxpayer Rights Handbook*, by the alleged statement of a Treasury employee, or by the alleged practice of the State's attorneys in prior cases) to file in the court of claims. *Id.* at 6-8. First, the Court of Appeals recognized that the *Taxpayer Rights Handbook* only applies to decisions of the Department of Treasury, and the decision at issue here was one of the Film Office. *Id.* at 6. Second, as to the alleged statement by the Treasury employee, the Court found that the statement could not provide a reasonable basis for the Film Companies to believe that jurisdiction in the Court of Claims was proper because the employee referenced a 60-day appeal period, which corresponded to the 60-day appeal period for the circuit court under the Administrative Procedures Act and not to 90-day appeal period identified in the statutory authority that the Film Companies relied upon for jurisdiction in the

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<sup>7</sup> As will be explained further below, the circuit court's order was on a form approved by the State Court Administrative Office which merely provides check-boxes for whether an application for leave to appeal is "granted" or "denied" (See Appellants' COA Exhibit 2). The form order did not require, or even specifically provide a space for, an explanation for a denial.

Court of Claims. *Id.* Lastly, the Court recognized that that argument, along with the argument about the State's practice in other cases, ultimately sounded in equitable estoppel. *Id.* at 7. And, even if a valid equitable estoppel argument could be made, subject-matter jurisdiction cannot be conferred by estoppel. *Id.* Accordingly, the Court of Appeals affirmed the decision of the circuit court denying the delayed application for leave to appeal.

On January 5, 2016, the Film Companies filed a motion for reconsideration of the Court of Appeals' opinion. The Court issued an order denying that motion on February 12, 2016. (Appellants' Application for Leave To Appeal, Appendix 2, Order). The Film Companies filed their application for leave to appeal with this Court on March 25, 2016.

## SUMMARY OF ARGUMENT

The Film Companies unnecessarily try to complicate the matter at issue in this case by creating illusory constitutional questions about the administration of tax laws and the rights of taxpayers in relation to those laws. But that's not what this case about. This case is about one very simple and clear issue: where should an appeal of an administrative agency be filed? Here, the Film Companies answered, "in the Court of Claims." They were wrong.

The Court of Claims Act expressly states that it "does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law." MCL 600.6419(5). When the State Agencies filed motions for summary disposition in the Court of Claims on that ground, the Film Companies dug their heels in. They argued that the case was properly in that court because it was actually a contract action seeking money damages, a position they have since abandoned. In the alternative, and contrary to the jurisdictional provisions set forth in their original complaint, they also argued that the Revenue Act provided the Court of Claims with jurisdiction because the case was allegedly about the Department of Treasury's denial of a refundable tax credit.

More than six weeks after the parties' argument began, and just one day before the six-month cutoff, the Film Companies filed a delayed application for leave to appeal in the circuit court while the Court of Claims case remained pending. MCR 7.105(G)(1) allows the circuit court to consider the length of and reasons for delay in determining whether to grant a late application to appeal. But

the Film Companies provided no reasonable explanation for their delay. In fact, they continued to maintain that the Court of Claims had proper jurisdiction over their case and that the delayed application was only filed as a precautionary measure.

The circuit court denied this precautionary application and later issued an opinion denying a motion filed by the Film Companies to reconsider that decision. The Film Companies tried to circumvent the circuit court's order by requesting that the State Agencies stipulate to set aside the circuit court's denial of leave. When the State Agencies declined, the Film Companies went back to the Court of Claims and supplemented the record notifying it of the circuit court's action and the State Agencies' audacity. The Court of Claims was unmoved though. A short time later, in a thorough opinion, Judge Talbot agreed with the State and found that the Court of Claims was not the proper forum for the appeal. The Court of Claims dismissed the case based on a lack of subject-matter jurisdiction under MCL 600.6419(5).

The Court of Claims was correct in determining that it lacked jurisdiction to consider the appeal of the Film Office's decision. And, the circuit court's denial of the Film Companies' delayed application for leave to appeal was properly within its discretion. There are no novel questions of jurisprudential significance or constitutional concern here. This case arises solely from the Film Companies' inability to answer the question, where does one file an appeal of an administrative decision? The answer is, "in the circuit court." This Court should deny the Film Companies' request that it consider such a rudimentary notion.

## ARGUMENT

**I. The Court of Claims Act specifically excludes an appeal of a decision of an administrative agency from the jurisdiction of the Court of Claims; jurisdiction over those appeals is vested exclusively in the circuit court.**

**A. Standard of Review**

The grant or denial of summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Jurisdictional rulings are also reviewed de novo. *Electronics Inc v Prudential Assurance Company Ltd*, 260 Mich App 144, 152 (2003). In addition, the proper interpretation of a statute is question of law that is reviewed de novo. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97 (2008).

**B. Analysis**

The burden of proof is on the Film Companies to establish subject-matter jurisdiction. *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37 (1992). In attempting to meet their burden of establishing jurisdiction in the Court of Claims, the Film Companies original complaint stated, on one hand, that this was an “original action,” yet, on the other hand, went on to cite: (1) the appeal provisions of the Administrative Procedures Act (APA), MCL 24.301 *et seq.*; (2) the court rule applicable to circuit court appeals, MCR 7.101; and (3) the constitutional provision allowing for judicial review of an administrative agency decision, Article 6, Section 28, which, by way of the Revised Judicature Act, provides for an appeal to circuit court (see Original Complaint, ¶ 21). The Film Companies then amended

their complaint. While the amended complaint omitted a citation to MCR 7.101, it still stated that this was an “original action,” yet also cited the appeal procedures of the APA and Article 6, Section 28 (which both provide for appeals to circuit court, not the Court of Claims), and then for the first time went on to add a reference to the statute providing for an appeal of a decision of the Department of Treasury to the Court of Claims, MCL 205.22, as well as the general jurisdictional statute for the Court of Claims, MCL 600.6419 (First Amended Complaint, ¶ 21).

In essence, the Film Companies have, at one point or another, cited every possible jurisdictional avenue leading from an agency decision; there have been original action avenues, appellate avenues, some leading to the Court of Claims, others leading to circuit court. That said, the Film Companies have now seemingly settled on MCL 205.22 and MCL 600.6419 as the alleged jurisdictional bases for their appeal to the Court of Claims. But as the Court of Claims correctly ruled, and the Court of Appeals properly affirmed, the Film Companies reliance on those provisions is misplaced.

**1. MCL 205.22 is inapplicable because the denial of the postproduction certificate of completion was a decision of the Film Office, not the Department of Treasury.**

The Film Companies argue that their appeal to the Court of Claims was authorized by MCL 205.22.<sup>9</sup> That statute provides, in relevant part, that a

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<sup>8</sup> This argument is set out in Section 4 of the Film Companies’ Application. (Appellants’ Application for Leave to Appeal pg. 37-40). Because this issue relates to the threshold question of subject-matter jurisdiction, and affects the other issues that the Film Companies raise, the Film Office has addressed it first.

“taxpayer aggrieved by an assessment, decision, or order of the *department* may appeal the contested portion...to the court of claims within 90 days...” (emphasis added).

In the Court of Claims, the Film Companies specifically acknowledged, “[t]he Film Office’s December 13, 2013 [sic: December 11, 2013] letter is a final ‘decision’ or ‘order,’” and that it was that decision or order they were seeking to appeal in the Court of Claims (First Amended Complaint, ¶ 16, 19). But a decision or order of the Film Office is not a “decision” or “order” of the “*department*” for purposes of MCL 205.22.

The Film Office was created in the Michigan Strategic Fund (MSF). MCL 125.2029a(1). The MSF, in turn, is a “public body corporate and politic” that is “an autonomous entity” within the Department of Treasury.<sup>10</sup> MCL 125.2005(1). Since the MSF is separate and apart from the Department of Treasury, the Film Office is similarly autonomous.

This autonomy is significant in light of the fact that, for purposes of MCL 205.22, “department,” means the Department of Treasury. MCL 205.1(3)(a). Since the Film Office is, as a matter of law, “autonomous” and independent from the Department of Treasury, it does not fall within the definition of “department.” Therefore, the appeal procedure specified in MCL 205.22 does not apply to a

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<sup>9</sup>Notably, the Film Office now resides in the Department of Talent and Economic Development.

decision or order of the Film Office, and the Court of Appeals properly affirmed the Court of Claims' dismissal on that ground.

The Film Companies have attempted to avoid the application of this clear statutory language by slowly trying to re-write the administrative action that they challenge. At the Court of Appeals, the Film Companies alleged that MCL 208.1455 sets forth the duties of the Department of Treasury, providing only a "limited role" for the Film Office, in administering the film credit, and that the Department of Treasury should not be allowed "to escape judicial review by putting form over substance." (Appellants' COA Brief, p 17.) The Film Companies now argue to this Court that any time the Department of Treasury undertakes any activity, even if tangential and for the benefit of another State agency, that action triggers application of the Revenue Act and vests the court of claims with jurisdiction over the dispute. (Appellants' Application for Leave to Appeal, pg 39.)

Ignoring for the moment that MCL 208.1455 actually details extensive duties of the Film Office, with only a limited role for the Department of Treasury, in administering the film credit, the undisputed fact remains that the Film Companies are admittedly seeking to appeal the December 11, 2013 denial of the postproduction certificate of completion, and the "duty" to issue that certificate under MCL 208.1455 falls squarely and solely on the Film Office. That statute provides, in part: "[i]f the Michigan film office determines that an eligible production company has complied with the terms of an agreement entered into under this section, *the office* shall issue a postproduction certificate of completion to

the company” (emphasis added). That the Department of Treasury assisted the Film Office in fulfilling this statutory duty by conducting an audit does not change the fact that the ultimate decision whether to grant or deny the certificate was that of the Film Office alone.

In sum, the decision being appealed in this case was that of the Film Office, not the Department of Treasury, and the Film Companies’ assertions to the contrary are without factual or legal support. Since the December 11, 2013 denial of the postproduction certificate of completion was not a “decision” or “order” of the “department,” that denial was not appealable to the Court of Claims under MCL 205.22, and summary disposition was properly granted in favor of the Film Office on that ground.

**2. MCL 600.6419 vests the circuit court, not the Court of Claims, with jurisdiction over the Film Companies’ appeal.**

The Court of Claims has exclusive jurisdiction:

[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1)(a).]

But the Court of Claims Act includes a limitation on this otherwise broad language.

Subsection (5) of that Act states that “[t]his chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.” An appeal to circuit court is authorized by law “from any order, decision, or opinion of any state board,

commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law.”<sup>11</sup> See MCL 600.631.

Based on MCL 600.6419(5) and MCL 600.631, since the Film Companies were seeking to appeal a decision of the Film Office, which is a state agency with the authority to promulgate rules, the Court of Claims properly determined that the circuit court, not it, had exclusive jurisdiction over the appeal. (Appellants’ COA Exhibit 1, p 8-9). And, the Court of Appeals properly affirmed the Court of Claims in that regard. (Appellants’ Application for Leave to Appeal, Appendix 1, pg 6).

### **3. The Film Companies’ red-herring arguments cannot vest the Court of Claims with jurisdiction.**

That the Court of Claims properly concluded it lacked jurisdiction over the Film Companies’ appeal is supported by the plain and unambiguous language of MCL 205.22 and MCL 600.6419. In attempting to persuade this Court that the lower courts erred though, the Film Companies have presented a host of fallacies irrelevant to the clear legal issue and law that applies in this case.

For example, the Film Companies argue that Section 5 of the Revenue Act, MCL 205.5, requires that the Department of Treasury prepare a brochure that outlines conditions to be met prior to the Department taking “departmental action” in administering a tax. (Appellants’ Application for Leave to Appeal, pg. 21.) They

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<sup>10</sup>The Film Commissioner has the authority to promulgate rules. MCL 125.2029b(6).

allege that the brochure, entitled the *Taxpayer Rights Handbook*, lists the MBT and “without qualification, instructs taxpayers that appellate recourse is to the Court of Claims.” *Id.* 22. The Film Companies argue that the Department took a “departmental action” here by conducting an audit and therefore their appeal was properly brought in the Court of Claims. *Id.* at 24.

Notwithstanding that the *Taxpayer Rights Handbook* is an informational pamphlet which expressly indicates that “it does not take the place of the law,”<sup>12</sup> and that these Film Companies have been represented by counsel during the course of the film project and these legal proceedings, the Handbook is not relevant to the jurisdictional dispute in this case for several reasons. First, the Film Companies did not appeal an action of the Department of Treasury; they appealed the decision of the Film Office to deny their postproduction certificate of completion. Second, because the Film Office is an autonomous legal entity, *The Taxpayer Rights Handbook* is not applicable to the Film Office, nor is the Film Office bound by it. And finally, as the Court of Appeals appropriately recognized, in making this argument, the Film Companies actually argue for the application of equitable estoppel. But, a court’s jurisdiction cannot be conferred by estoppel. *In re AMB*, 248 Mich App 144, 166 (2001).

As a second and related argument, the Film Companies also contend that the Court of Appeals erred in allowing the Department to “retroactively change” its public position that the Court of Claims was the appropriate forum for challenges

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<sup>11</sup> See Appellants’ Application for Leave to Appeal, Appendix 3.

made to Department action. (Appellants' Application for Leave to Appeal, pg. 27-28.) But this argument fails for the same reason as the first—the *Handbook* doesn't apply to decisions made by the Film Office. By law, the Film Office is an autonomous entity that exercises its "powers, duties and functions independently" from the Department. MCL 125.2005(1). And even if the Handbook represented the public position of the Department of Treasury on the administration of film credits (which it does not), the Film Office cannot be legally bound by those representations.

Next, the Film Companies advance a host of arguments that attempt to justify subject matter jurisdiction based on the conduct of other parties. For example, the Film Companies argue that a Treasury employee advised them of a 60-day appeal period. (Appellants' Application for Leave to Appeal, pg. 30-31.) They reason that this 60-day appeal period is closer to the 90-day period applicable under the Revenue Act than the 30-day appeal period applicable to circuit court appeals, so therefore the Department must have been advising them to file in the Court of Claims. *Id.* They also allege that the Film Office and Department of Treasury acquiesced to the jurisdiction of the Court of Claims in 8 other film credit cases from 2010 - 2013. *Id.* at 29-30.

While the Film Office and the Department vigorously dispute the Film Companies' representations as to both of these issues, it is not necessary to belabor that dispute here. Instead, it is sufficient to say that, as a matter of law, parties may not waive or stipulate to subject-matter jurisdiction. *People v Eaton*, 184 Mich

App 649, 653 (1990). In fact, subject-matter jurisdiction is so critical that a court has an independent obligation to take notice of a lack of jurisdiction, even when the parties do not raise the issue. *In re AMB*, 248 Mich App at 166. Accordingly, the State cannot confer subject-matter jurisdiction by action or words when jurisdiction does not exist as a matter of law. The Film Companies' arguments in this regard are unpersuasive.

Lastly, and related to the alleged actions of the State actors, the Film Companies raise various constitutional challenges. For example, they argue that the Treasury employee's alleged reference to a 60-day appeal period, and then the Department's subsequent motion for dismissal of the appeal, constitutes a denial of due process and the retroactive application of a law. (Appellants' Application for Leave to Appeal, pg. 40-41). They also allege that the State Agencies' actions in moving for summary disposition in this case deprived them of the opportunity to be heard in violation of their due-process rights and resulted in disparate treatment in violation of their equal-protection rights. *Id.* 41-46. These constitutional claims lack merit.

First, while the Department disputes that its employee advised the Film Companies that they had 60 days to file an appeal, even if such a representation occurred, that representation is inconsequential. It is well-settled that the State is not bound by a representation solely because the speaker is an employee of the State. See *Sittler v Bd of Control of the Michigan College of Mining & Technology*, 333 Mich 681, 687 (1952) (citing *Roxborough v Unemployment Compensation*

*Commission*, 309 Mich 505 (1944)). Nor could the representation of a State employee modify a statute or court rule that defines the court's jurisdiction to hear a case. Thus, even if true, a stray comment by a State employee does not set forth a basis to argue a denial of due process or the retroactive application of the law.

Second, the procedural posture of this case is solely attributable to the strategic decisions of the appellants' counsel. These Film Companies, which have been represented by counsel throughout their dealings with the State Agencies and during the entire course of these legal proceedings, chose to file an appeal challenging the decision of the Film Office in the Court of Claims. They then decided to wait more than 6 weeks after having received notice of the State's challenge to that court's jurisdiction to file their delayed application for leave to appeal in the circuit court. And when they finally filed a delayed application for leave to appeal in the circuit court, they provided no reasonable explanation for the delay and instead maintained that the Court of Claims, not the circuit court, had jurisdiction over their appeal.

Notwithstanding a court's independent obligation to evaluate its jurisdiction, the filing of a motion for summary disposition on that ground by the State's attorneys did not deprive the Film Companies of due process or equal protection of the law. The Film Companies had a forum in which to litigate their claims, the circuit court, but they failed to timely file and preserve their appeal there. This failure is based wholly on their actions and not the conduct of the State; therefore, the constitutional claims they advance on that basis are devoid of merit.

**II. The circuit court did not abuse its discretion in denying the Film Companies' delayed application for leave to appeal where the application did not cite a statute that authorized a late appeal or provide a reasonable explanation for the delay.**

**A. Standard of Review**

The circuit court's denial of leave to appeal is reviewed for an abuse of discretion. "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12 (2007).

**B. Analysis**

Although the circuit court did not offer an explanation for the denial of the Film Companies' delayed application for leave to appeal, there were multiple, reasonable bases for the denial, each of which placed the circuit court's decision within the range of reasonable and principled outcomes. Consequently, the circuit court's denial of the delayed application for leave to appeal did not amount to an abuse of discretion, and was properly affirmed by the Court of Appeals.

**1. The Film Companies failed to meet their burden to establish that the circuit court had jurisdiction to grant their delayed application for leave to appeal.**

As mentioned, the burden of proof is on the Film Companies to establish subject-matter jurisdiction. *Universal Am-Can Ltd*, 197 Mich App at 37. In the circuit court, the Film Companies cited MCR 7.105(G) as jurisdictional support for their delayed application for leave to appeal. (Delayed Application for Leave to

Appeal, p 5-6.) But MCR 7.105(G), in and of itself, is insufficient to vest the circuit court with jurisdiction to grant leave to appeal.

MCR 7.105, in general, provides *the manner in which* an application for leave to appeal is to be filed in circuit court. Subrule (G), upon which the Film Companies relied, specifically provides that when an appeal of right or an application for leave to appeal was not timely filed, a delayed application for leave to appeal may be filed within 6 months of the decision appealed. But MCR 7.105 is merely a procedural provision; it is not a jurisdictional provision. Instead, the circuit court's jurisdiction over an application for leave to appeal is established by MCR 7.103(B), which provides, in regard to agency decisions, that the circuit court may grant leave to appeal from:

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(2) a final order or decision of an agency from which an appeal by leave to the circuit court is provided by law;

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(4) a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal; [MCR 7.103(B).]

Here, the Film Companies failed to even mention, let alone establish, the jurisdictional basis on which leave to appeal could be sought under MCR 7.103(B) in the first place. At one point in the delayed application for leave to appeal, the Film Companies stated, "MCL 600.631 creates an appeal of right to the circuit court . . ." (Delayed Application for Leave to Appeal, p 5.) Assuming, without conceding, that the Film Companies had an appeal of right to circuit court from the Film Office's decision, then the circuit court had jurisdiction to grant leave to appeal only "if an

appeal of right was not timely filed and *a statute authorizes a late appeal.*” MCR 7.103(B)(4) (emphasis added). But the Film Companies failed to cite any statute that would authorize a late appeal from a decision of the Film Office. Without offering the circuit court any grounds on which leave could be granted under MCR 7.103(B), the Film Companies failed to meet their burden of establishing subject-matter jurisdiction in the circuit court. On this basis alone, the circuit court’s denial was within the range of reasonable and principled outcomes and therefore did not amount to an abuse of discretion.

**2. The length of, and explanation for, the delay in filing the application for leave to appeal was unreasonable.**

Even assuming the circuit court had jurisdiction to grant leave to appeal, a denial of delayed leave to appeal was still a proper exercise of discretion. In deciding whether to grant delayed leave to appeal, the circuit court “may consider the length and the reasons for the delay.” MCR 7.105(G)(1). Here, the length of, and absence of persuasive reasons proffered for, the delay provided a reasonable basis for the denial of leave.

Delayed leave to appeal may not be granted “more than 6 months after the entry of” the decision appealed. MCR 7.105(G)(2)(a). The Film Companies filed their delayed application for leave to appeal only 1 day before that 6-month period expired.<sup>13</sup> Since the length of the delay is a relevant factor for the circuit court to

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<sup>12</sup> The decision of the Film Office was issued on December 11, 2013, and the delayed application for leave to appeal was filed in circuit court on June 10, 2014.

consider in deciding whether to grant the application, and the delay in this case was about as lengthy as is even allowed, it is difficult to conclude that the dismissal was unjustified or outside the range of principled outcomes.

The length of the delay is particularly unreasonable in light of the Film Companies' proffered explanation for it. According to them, the delayed application was filed in response to the state agencies moving the Court of Claims for summary disposition on jurisdictional grounds in the related action. (Delayed Application for Leave to Appeal, p 5-6). The Film Companies indicated that they continued to believe that the appeal was properly before the Court of Claims and only filed in circuit court as a precautionary measure.

But first of all, the motions for summary disposition were filed by the state agencies in the Court of Claims more than six weeks before the Film Companies filed their delayed application for leave to appeal in circuit court; so there was a significant, unexplained, delay in the filing of the application for leave to appeal in circuit court even after the Film Companies became aware of State's position in the Court of Claims. Second, contrary to the Film Companies' assertions, the state agencies' position in the Court of Claims was not the product of some malicious scheme, but the product of a simple reading of the Court of Claims Act, a reading the Film Companies could, and should, have engaged in well before June 10, 2014, if not before filing the complaint in the Court of Claims. Third, and perhaps most importantly, the state agencies were correct in their assertion that the Court of Claims did indeed lack jurisdiction over the appeal.

As mentioned, subject-matter jurisdiction must be established by law and cannot be conferred on any court by the parties.<sup>14</sup> While the Film Companies engage in unnecessary hyperbole that places blame on the State, the state agencies can hardly be blamed for moving the Court of Claims for summary disposition on jurisdictional grounds. In actuality, the delay in filing in the circuit court was attributable entirely to the Film Companies' own decision to file an appeal in a court that lacked jurisdiction, and such culpable negligence generally does not justify delay. See e.g., *Cooper v LaBuda*, 308 Mich 737, 742-743 (1944) (discussing former court rules that allowed for a delayed application to the Supreme Court to be granted where "the delay was not due to appellant's culpable negligence"); MCR 7.216(B) (Court of Appeals may extend deadlines but not where the delay was "due to the culpable negligence of the party or attorney"). The Film Companies' disparaging characterizations of the State's actions are nothing more than a last ditch attempt to appeal to this Court's sympathies by shifting the focus away from the law and their own culpability.

The Film Companies also make much of the fact that the circuit court used a SCAO-approved form order which provides boxes for the court to check indicating whether the delayed application is granted or denied, but does not provide a space for a specific explanation of the court's rationale. (Appellants' Application for Leave to Appeal, pg. 35-37.) But, as the Court of Appeals correctly observed, the circuit court also issued an order denying a motion for reconsideration and expressly stated

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<sup>13</sup> *In re AMB*, 248 Mich App at 166.

that the issues presented by the Film Companies had already been considered by the court. (Appellants' Application for Leave to Appeal, Appendix 1, COA opinion, pg. 7.) "This indicated that the circuit court was familiar with the issues in plaintiffs' delayed application, even if it did not explain its analysis on the denial form." *Id.* Accordingly, the Court of Appeals properly held that there was no evidence that the circuit court's order denying the delayed application was a result of an abdication of discretion. *Id.* The Court of Appeal properly affirmed the circuit court on that basis.

Because the circuit court had ample justification for denying delayed leave to appeal, the denial was within the range of reasonable and principled outcomes and was properly affirmed by the Court of Appeals.

## CONCLUSION AND RELIEF REQUESTED

The Court of Claims did not have jurisdiction over the appeal of the Film Office's decision, and the delay in seeking leave to appeal to circuit court was attributable to the Film Companies' failure to recognize that fact and provides a reasonable basis for the circuit court's discretionary denial of delayed leave to appeal.

The Film Office respectfully requests that this Court deny the Film Companies' application for leave to appeal the Court of Appeals' decision affirming the circuit court's June 17, 2014 denial of delayed leave to appeal in Docket Number 323299, and affirming the Court of Claims' August 8, 2014 dismissal in Docket Number 323424.

Respectfully submitted,

Bill Schuette  
Attorney General

Aaron D. Lindstrom (P72916)  
Solicitor General  
Counsel of Record

Matthew Schneider (P62190)  
Chief Legal Counsel

/s/Christina M. Grossi-----  
Christina M. Grossi (P67482)  
Joshua O. Booth (P53847)  
Assistant Attorneys General  
Attorneys for Michigan Film Office  
Defendant–Appellee  
State Operations Division  
P.O. Box 30754  
Lansing, MI 48909  
(517) 373-1162

Dated: April 21, 2016